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No. 81-2315

In the

Supreme Court of the United States

October Term, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, Inc.,

Respondent.

Brief in Behalf of Respondent Prudential Lines, Inc., in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. A longshoreman claims personal injuries during his employment and brings an action in his own name against the third-party shipowner, which action is time-barred by § 33 (b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933 (b). May his employer, under Rule 17(a), F.R. Civ.P. ratify the commencement of that action in the employee's own name and on his own-behalf after the statutory period of limitations within which the employee might sue has passed and thereby prevent dismissal of the action on the ground that it is time-barred?*

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* The question is the certified question upon which the appeal below was heard. It was answered in the negative by the Court of Appeals (See Appendix to petition, pages 1a, 2a, 13a).

2. Whether the State Insurance Fund as a claimed statutory assignee of petitioner's cause of action under the longshoremen's and Harbor Workers' Act, as to whom the statute of limitations would bar its own independent action, can validly ratify or re-assign petitioner's otherwise time barred suit against defendant Prudential Lines.

3. Where neither the insurer nor the longshoreman, proceeding alone, could maintain the action may a court by judicially fusing the two expired claims determine that the action was newly resuscitated under F.R.Civ.P.17(b)?

4. Does a New York State statutory prohibition against assignment of personal injury claims (New York General obligations Law §13-101) in any event preclude the stevedore's and its insurance carrier's re-assignment of the claim to petitioner?

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ANGELO DEL RE,

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PRUDENTIAL LINES, INC.,

Respondent.

BRIEF IN BEHALF OF RESPONDENT PRUDENTIAL LINES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Prudential Lines, Inc., opposes petitioner's petition for a writ of certiorari seeking to review the determination of the United States Court of Appeals for the Second Circuit, in the instant case, decided January 21, 1982 (669 F2d 93).

STATEMENT OF THE CASE

Petitioner brought suit against respondent Prudential Lines, Inc., to recover damages for personal injuries which he claims to have sustained on March 7, 1975, when he was employed by Northeast Stevedoring Company as a longshoreman on Prudential's vessel the SS Santa Barbara then docked at Brooklyn.

Petitioner commenced the instant action by the filing of a summons and complaint on April 28, 1980, more than five years after the alleged accident and more than three years and two months after the final U.S. Department of Labor order awarding petitioner compensation.

A previous New York State Supreme Court action for the same cause of action was commenced by service of a bare summons, without complaint, upon respondent on October 17, 1977. Respondent never

appeared in the state court action and petitioner failed to take any steps to prosecute his action. On March 4, 1981, petitioner voluntarily discontinued his State Supreme Court action.

In its answer to the instant complaint which was served on petitioner on June 4, 1980, respondent raised the defense of laches and the further defense based upon the petitioner's failure to state a cause of action upon which relief can be granted (F.R.Civ.P.12(b)(6) since he had lost his right of action pursuant to 33 U.S.C. 933(b) in failing to commence it within six months following the termination of compensation.

Thereafter, respondent moved to dismiss the complaint on the grounds of laches and on the ground of petitioner's failure to state a cause of action upon which relief could be granted pursuant to 33 U.S.

C. 933(b).

The District Court, in its opinion dated January 30, 1981, denied the motion to dismiss the complaint as to the defense of laches but without prejudice to renewal at the close of trial. The motion to dismiss on the grounds of the failure to bring this action within six months of the termination of compensation payments was also denied without prejudice to renewal since respondent was unable at that time to produce petitioner's compensation records.

Respondent then renewed its motion to dismiss on the grounds of petitioner's failure to bring this action within six months of termination of compensation payments, when it had received the compensation records which indicated that considerably more than six months elapsed between the date of the final compensation

award to petitioner and the commencement of his action.

Petitioner did not dispute the fact that he commenced suit more than six months after his scheduled award was finalized by the United States Department of Labor Deputy Commissioner. In an effort, however, to prevent dismissal of this action petitioner procured a letter dated May 12, 1981, from the State Insurance Fund purporting to assert that it "ratified" petitioner's unilateral commencement of this suit.

Petitioner's attorney's affidavit in opposition to the motion only claimed that the motion to dismiss should not be granted because the State Insurance Fund, the insurance carrier for petitioner's employer, "ratified" his suit, e.g., reassigned the cause of action to petitioner.

The District Court in its opinion dated

June 18, 1981, denied respondent's motion stating:

> "The insurer cannot institute an action in its own name because the statute of limitations bars such a proceeding; the longshoreman cannot maintain an action in his own name because more than six months have elapsed since receipt of the compensation award; although neither the insurer nor the longshoreman, proceeding alone, can maintain the action, the consequence of the longshoreman having brought an action within the period of the statute of limitations in conjunction with the ratification by the insurer, permits the action to be resuscitated under F.R.Civ.P.17(a)."

The District Court specifically found that petitioner's action could not be maintained in his own name because more than six months had elapsed since receipt of the compensation award and that the insurer's action could not have been instituted any more because the expired statute of limitations had barred such a proceeding. Nevertheless it denied the motion on the ground that by fusing the two expired causes of action into one the

petitioner's action could be resuscitated by fashioning an entirely new set of remedies to deal with an aspect of the problem that Congress expressly addressed, and by providing a new procedural device to avoid or undo the assignment of a longshoreman's cause of action.

On July 7, 1981, the District Court amended its opinion and order of June 18, 1981, certifying the question for appeal to enable immediate interlocutory review pursuant to 28 U.S.C.§1291(b).

The Court of Appeals granted petitioner's motion for leave to appeal under its order dated August 11, 1981.

POINT ONE

STATE INSURANCE FUND'S REMEDY AGAINST RESPONDENT IS EXCLUSIVE AND CANNOT BE RE-ASSIGNED TO PETITIONER.

The primary issue before this Court is whether the State Insurance Fund, as a claimed statutory assignee of petitioner's personal injury claim under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 933(b) (hereinafter referred to a LHWCA), can re-assign the cause of action to petitioner notwithstanding the fact that petitioner's cause of action is time-barred and he no longer has a cause of action against Prudential. This Court in Rodriguez v. Compass Shipping Co., Ltd., 41 CCH S.Ct. Bult. 2478, U.S., 49 U.S. Law Week 4527 (May 18, 1981), proscribes the purported ratification or re-assignment herein. To permit State Insurance Fund's ratification or re-assignment to be effi-

cacious is to read §933(b) out of the Act. Congress certainly did not intend such a debilitating result.

This Court concluded in Rodriguez that the LHWCA limitation period and assignment provisions are rendered meaningless if a longshoreman can bring suit against a shipowner after the limitation period for his suit expires. The Court stated in this regard at 49 Law Week 4529:

> "The statutory assignment encompasses 'all right' of the employee to recover damages from a third party. These words preclude the possibility that the assignment is only a partial one that does not entirely divest the employee of his right to sue, or that the employee and the employer possess concurrent rights to sue in the post-assignment." (Emphasis supplied.)

Consequently, the Court impliedly, if not explicitly, proscribed suits such as the one at bar.

This Court's Rodriguez decision broadly stands for the proposition that a longshoreman may not pursue a claim for

damages against a shipowner unless he brings the action within six months following his acceptance of a final award of compensation. More specifically however, Rodriguez must be read to prohibit an employer's ratification or re-assignment of its §933(b) claim since such an act creates a new remedy which Congress did not provide for in the LHWCA. The Supreme Court stated at 49 Law Week 4532; 68 L.Ed.2d 485,486:

> "We are persuaded that Congress did indeed intend to require the employee either to act promptly or to accept the consequences of an assignment of his claim to the employer. One of the consequences ...is the risk that the employer will choose not to sue. The comprehensive character of the procedures outlined in the act precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress expressly addressed." (Emphasis supplied.)

There is no doubt that Rodriguez denies longshoremen the right to prosecute their causes of action once the six-month period

has elapsed. Rodriguez construed §933(b) as a comprehensive set of statutory procedures which precludes the fashioning of substitute remedies. At bar the insurance carrier chose not to sue and allowed the statue of limitations to run out. It can not now "ratify" a cause of action that has already expired.

The U. S. Supreme Court specifically noted that Congress intended to require a longshoreman to act promptly within the six-month limitation period or be forever barred from suing a third party (Rodriguez, supra, at 4530). It is apparent, therefore, that the District Court's view that the six-month limitation period may be avoided by re-assignment of the cause of action to the longshoreman ignores the Supreme Court's construction of the statutory language of §933(b).

It should be noted that the Supreme

Court held at 49 Law Week 4532:

> "The fact that parties sometimes fail to assert meritorious claims within the period authorized by law is not a sufficient reason for refusing to enforce an unequivocal statutory bar."

After discussing the clear import of the statutory language of §933(b), Rodriguez examined the legislative history behind the LHWCA. It noted that the six-month time bar "***set forth in §933(b) protects the interests of both the employees and the employers, and is consistent with the general policy of the Act to encourage prompt and efficient administration of compensation claims." Rodriguez, at 4531, supra. (Emphasis supplied.)

The Court also examined the 1972 Amendments to the LHWCA and pointed out that Congress purposefully balanced by statute the conflicting interests of vessel owner, stevedore and longshoreman. The compre-

hensive scheme enacted by Congress to balance and protect the competing interests of the parties involved required the Court in Rodriguez to deny a demand that the Court fashion a new remedy which was not created by the LHWCA. The Court stated at page 4532:

> "As with other problems interpreting the intent of Congress in fashioning various details of this legislative compromise the wisest course is to adhere closely to what Congress has written. The meaning of §933(b) is plain and should be respected."

Ratification should be no more successful as a procedural device to evade the requirements of the statute than assignment. Further, an invalid action cannot be made valid by ratification. In the case at bar petitioner's instant suit has been invalid as time-barred long before the day it was filed. The insurer's cause of action was also time-barred as six years have passed since the alleged

injury, twice the statutory period. The petitioner cannot by belated self-help reacquire a cause of action long ago assigned away by operation of statute; nor can the insurer revive its own expired claim by the semantic exercise of conjoining these two expired claims into a suddenly timely one. It was not the intent of Congress to allow reimcarnation of time-barred claims. This conclusion is mandated by the unanimous ruling of the U.S. Supreme Court in Rodriguez v. Compass Shipping Co., Ltd., supra.

Subsequent to the Rodriguez decision, the U.S. District Court for the Eastern District of Virginia (Norfolk Division) held in Bandy v. Bank Line Ltd., No. 77-7160, E.D. Va., July 7, 1981, that:

> "The language of the Act (LHWCA) is plain and unequivocal and does not provide for either the substantive right to receive such an assignment or for the procedure used by the

> plaintiff. To hold otherwise would constitute an end run around and make a mockery of the clear Congressional mandate that a longshoreman file his suit within six months of the receipt of an award." (Emphasis supplied.)

Bandy involved a similar "assignment" as in the case at bar. We believe the language of Bandy on that point deserves repetition here:

> "The Act and its legislative history, as interpreted by the Rodriguez Court, clearly forbid such a pro forma procedure for reinstating a longshoreman's right to sue a third party once he has lost such a right because of his failure to file suit within the six-month limit established by the Act."

Bandy provides an illuminating insight into the tactical advantages obtainable if such a re-assignment by the insurance carrier to the longshoreman may be used to evade the clear mandate of §933(b). The learned Court there noted:

> "Absent a conflict of interest, an employer or compensation carrier who had failed to pursue the cause of action, either because it had been

> dilatory or because it believed that the action was so weak that it did not wish to risk the cost of litigation, certainly would assign that right to the employee in the hope that the employee would initiate the action. If for example, the employee brought suit seeking a nuisance settlement, to harass the third-party tortfeasor, or even in the mistaken belief that he had a valid claim, the employer or its compensation carrier, by virtue of its statutory lien, would be the beneficiary, without risk, of any unexpected recovery.
>
> "Accordingly, an employer or compensation carrier would be foolish not to expend the insignificant effort required to execute an assignment of the right of action upon a request by the longshoreman in every case that it had decided not to pursue and in which no conflict of interest existed."

The language of the statute is clear. A longshoreman may accept compensation benefits and still bring a third-party action provided he does so within the six (6) month period set forth in §933(b). Failure to do so operates as an assignment to his employer of "all right" to bring the third-party action. Congress evidently chose not to go further. It made no

provision for restoration of the cause of action to the longshoreman either by way of ratification or assignment or reassignment or other procedural mechanism. Certainly Congress did not intend to allow extensions of the six-month period such that a third-party cause of action could thereby be shuttled about without end.

If petitioner's argument were to prevail it would result in authorizing a time-barred petitioner to join forces with a time-barred assignee to bring an action by petitioner and revitalize it by "ratification" seeking to resuscitate it like the legendary phoenix which rose alive from its own ashes. In effect, such a result will unfairly allow State Insurance Fund to avoid the consequences of its own default by ratifying petitioner's default.

The Court of Appeals, in its carefully considered opinion below, correctly and

succinctly concluded with the following (Appendix to petition, p. 13a):

> "We adhere to the principle of Rodriguez, that if a longshoreman fails to bring suit within six months after receiving a compensation award he loses completely his right to sue the shipowner. Thereafter only the employer-stevedore or its subrogated insurer may institute such an action."

POINT TWO

THE STATE INSURANCE FUND'S "RATIFI CATION" IS A PURPORTED ASSIGNMENT OF A SUBSTANTIVE RIGHT WHICH IS INVALID UNDER THE NEW YORK GENERAL OBLIGATIONS LAW.

As noted above, Rodriguez holds that the assignment of a longshoreman's claim to an employer under §933(b) of the LHWCA is a relinquishment of both the longshoreman's substantive right and his remedy against the shipowner. Thus, the State Insurance Fund ratification of petitioner's barred cause of action is really a re-assignment of the State Insurance Fund's cause of action.

Since the State Insurance Fund's re-assignment is a transfer of a personal injury cause of action, the re-assignment is invalidated by the New York General Obligations Law (hereinafter referred to as GOL) affecting transfers of claims. Section 13-

101 of the GOL provides in pertinent part that:

> "Any claim or demand can be transferred except in one of the following cases:
>
> "where it is to recover damages for personal injuries;...."

By virtue of GOL Section 13-101, subdivision 1, "a personal injury claim is not assignable except by specific authority." Unlike the statutory assignment to the employer provided for in Section 933 (b), there is no statutory authority permitting the assignment by the employer or its insurance carrier to the employee. The statutory and substantive law of New York applies in this federal diversity case to the extent that the New York law affects the substantive rights of petitioner and his claim. See, 28 U.S.C. §1652; McCormack v. Bloomfield Steamship Co., 299 F. Supp. 488 (S.D.N.Y.1974); Hazel Bishop

Inc. v. Perfemme, Inc., 314 F.2d 399(2nd Cir. 1963).

The substantive law of New York on the very issue at bar has been passed upon favorably to respondent's view. See, Alongi v. McAllister Lighterage Lines,Inc., 433 N.Y.S. 2d 525; 107 M.2d 122(1980); and Lo Bue v. Prudential Lines, Inc., No. 12508/81 (Sup.Ct., Kings County, decided August 3, 1981).

In Lo Bue v. Prudential Lines, Inc., supra, the trial judge pointed out that the "ratification" procedure is not recognized in New York, stating:

> "The Court observes first that the so-called 'ratification' is really an assignment to the plaintiff of a personal injury claim now belonging to plaintiff's employer's or the employer's insurance company. By virtue of GOL Section 13-101 subdivision one a 'personal injury claim is not assignable except by specific statutory authority' (Juba v. General Bldgs. Supply Corp. [N.Y. 2d 53]). Unlike the statutory assignment to the employer provided for in Section 933(b), there is no statutory authority permit-

ting the assignment by the employer or its insurance carrier to the employee. The insurance company's is therefore precluded from assigning its cause of action to the employee (Alongi v. McAllister Lighterage Line, Inc. [107 Misc. 2d 122])."

POINT THREE

THE PETITIONER IS NOT THE REAL PARTY IN INTEREST.

The true meaning of "real party in interest" under Rule 17 of the Federal Rules of Civil Procedure is summarized as follows:

> "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced." 3A J. Moore, Federal Practice §17.07 (2d Ed.,1979).

The purpose of Rule 17 is to require the action to be prosecuted by the person who possesses the right to enforce the underlying claim and who has a significant interest in the litigation according to the substantive law. Virginia Electric & Power Co. v. Westinghouse Electric Corp., 485 F. 2d 78 (4th Cir.1973). If the state substantive law dictates that a person has an enforceable right, he is the real party in interest for the purposes of

District Court diversity action. 3A J. Moore, supra, at 17-74; Dubuque Stone Products v. Fred L.Gray Co., 356 F.2d 718 (8th Cir.1966).

It is admittedly true that, if the State Insurance Fund and Northeast Stevedoring Company are the plaintiffs, the present plaintiff would have an interest in any recovery which they might obtain from Prudential under the provisions of §933(b). However, it is also true that the nature of the present plaintiff's interest in an action brought by State Insurance Fund and Northeast Stevedoring Company would be a mere expectancy. A longshoreman has no right to demand that his employer or its compensation carrier prosecute his case. See,Rodriguez, supra. Having no right to sue or to compel suit, the longshoreman cannot be said to be the real party in interest after his claim has

been assigned. This Circuit has initially ruled in Rodriguez, 617 F.2d 955(2nd Cir. 1980), that upon assignment by operation of the LHWCA, the longshoreman's employer becomes the real party in interest. See also, United Federation of Postal Clerks v. Watson, 409 F.2d 962 (D.C.Cir. 1969).

It should be noted that the re-assignment herein may also lead to multiplicity of suits. The State Insurance Fund by its so-called ratification waived all rights against Prudential. However, Northeast Stevedoring Company has not waived its rights against Prudential, and has not ratified petitioner's suit, thus leaving Prudential still potentially subject to suit by Northeast Stevedoring Company albeit somewhat protected by the expired statute of limitations.

Since state and federal law hold that the State Insurance Fund and North-

east Stevedoring Company possess the exclusive right to proceed against Prudential and, since they are the real parties in interest, the action can only be prosecuted by them.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
July, 1982

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